definition of adverse dispositions. Moreover, there has been strong objection to the scope of application, which in particular makes tax administration free from the application of the Act. Although it is important to root the Act deeply in administrative process, the Act is said to have potential of future drastic revisions.

In the end it is emphasized that the degree of the impact that this new Act will have upon administration depends upon the degree of public attention concerning the application of the Law.

Prof. KENJI URATA
SATOSHI KOTAKE

2. Commercial Law

An Act to Partially Amend the Commercial Code, and so on. Promulgated on June 14, 1993. Ch. 62. Effective as of October 1, 1993.

[Background]

The Act to Amend the Commercial Code, and so on (hereinafter referred to as "Amendment Act") has two parts; the reform of some systems involved in corporate governance and the improvement in the corporate bond system. As to the corporate governance, the Amendment Act first has improved the representative action system to reduce suit filing costs incurred by plaintiff shareholders, and secondly lightened the requirements concerning shareholders' inspection rights of corporate account books and records in order to facilitate the exercise of these rights. Thirdly, reforming the corporate auditing system for the purpose of consolidating the corporate auditor's position and strengthening its function, the Amendment Act has not only extended the auditor's term of office in every stock corporation, but also increased the required number of auditors and introduced both an outside auditor and a board of auditors in the "large-sized corporation" under a special act under the Commer-

cial Code providing for the auditing system etc. of stock corporations (hereinafter referred to as "Audit Special Act"). On the other hand, the Amendment Act has improved the corporate bond system as a long-pending problem for some purposes and abolished the bond issuance limit.

It is often said that this partial amendment of the Commercial Code, and so on was caused by the external pressures such as the requests of the U.S.A. side in the Structural Impediments Initiative talks (S.I.I.) and the internal factors of corporate scandals in the financial and securities businesses, bid-rigging in the construction industry and so on. Observing how this Amendment Act was enacted, it is true that those factors accelerated the law-amendment. But the rationalizations of the shareholders' representative action and inspection right, the improvement of the corporate auditing system and the reform of the corporate bond system have all been considered as part of the entire amendment project of Corporate Law since the 1974 amendment of the Commercial Code. In this sense, the amendment of the Commercial Code etc. in 1993 is one stage of this entire amendment project of Corporate Law, and so this partial amendment can be thought to have simply been accelerated by S.I.I. and so on.

In following sections we will make a survey of the contents of the Amendment Act.

[Outline of the Amendment Act]

(1) Improvement of Shareholders' Representative Action.

The shareholders' representative action under the Japanese Commercial Code was modeled on that under U.S. law when the Commercial Code was amended in 1950. This is a right to file suit which any shareholder with a single share in a corporation held continuously for six months may use. Thus, originally it could be easy for shareholders to exercise this right. But in Japan shareholders' representative action has seldom been used in contrast with that under U.S. law. Why? The basic reasons have been thought to lie in both the calculaltion of a fee for filing representative action and the limited incentive to file the action.

First, considering the suit-filing fee issue, in order to file representative action, a plaintiff shareholder must pay a suit-filing fee, which is calculated in proportion to the jurisdictional amount in stamps attached to a complaint. If the plaintiff does not pay the required fee, the suit is dismissed as not satisfying the requirement to file suit. The point at issue is the amount of this fee. Under the Code of Civil Procedure and the Civil Proceedings Cost Act the fee for "claim on proprietary rights" is to be calculated according to legal formula on the basis of the jurisdictional amount. As a result the larger the jurisdictional amount is, the higher the fee becomes. On the other hand, in the case of "claims based on rights other than proprietary ones", the jurisdictional amount is regarded as 950,000 yen uniformly, and accordingly the fee for such claims is calculated at 8,200 yen. But in the practices followed by the courts in the past, the shareholders' representative action has been deemed as a "claim on proprietary rights" and the fee has been calculated in proportion to the jurisdictional amount, although the plaintiff shareholder does not obtain direct interests to the value of the amount. For this reason, a plaintiff must pay a fee in proportion to the jurisdictional amount from his own pocket for the time being, and so this has had an almost prohibitive effect on shareholders filing representative actions.

Secondly, as to the incentive for filing representative action, because this is a suit which a shareholder files on behalf of his corporation, it is not the plaintiff shareholder but the corporation concerned that recovers damages if the plaintiff wins. On the other hand, a plaintiff who loses a representative action must bear the legal costs, and is likely also to be the object of a claim for damages by defendant directors. Though the plaintiff shareholder, if he wins the suit, may require the defendants to repay the legal costs born by him and may claim a reasonable amount of the lawyer's fee against his corporation, it has not been clear if a plaintiff shareholder who wins the suit can also claim against his corporation other incidental expenses such as inquiry costs for suit-filing, and travelling expenses to the place of the head office. This has weakened the incentive for shareholders to file a representative action and has prevented even the sound use of this action coupled with the suit filing fee issue.

Thus, principally for the purpose of lightening the suit-filing fee to be born by the plaintiff shareholder, the Amendment Act has provided for a uniform fee of 8,200 yen, whatever amount is claimed by the plaintiff filing representative action — though it should be noted that if the corporation itself is to sue for its directors' liabilities, the fee shall be calculated in proportion to the jurisdictional amount.

Secondly for the purpose of improving the incentive for a shareholder to file a representative action, it was proposed to introduce the reward for the plaintiff shareholder who wins, which proposal was not realised. But the Amendment Act has made some improvements in both the necessary expenses for carrying out a representative action and the amount which a successful plaintiff shareholder may claim against his corporation, by providig that if the successful plaintiff shareholder in a suit paid the necessary expenses to carry out the proceedings in addition to the legal costs which he claimed against the defendants under the Code of Civil Procedure, or if he paid the lawyer's fee, he may claim against his corporation a reasonable amount of the said expenses and the lawyer's fee. Incidentally, "necessary expenses to carry out proceedings other than the legal costs" include, for example, inquiry costs necessary to file and carry out the proceedings (the costs for inspection or copying of the minutes of the board of directors etc.), travelling costs to the lawyers' office borne by client, travelling expenses to the court for filing a complaint, and so on.

(2) Rationalisation of Shareholders' Inspection Right of Corporate Account Books etc.

Article 293-6 of the Commercial Code prior to the 1993 amendment provided that a shareholder with 10% or more of the issued shares in a corporation may exercise the right to inspect and copy its account books and records. This is a shareholder's inspection right. The Amendment Act of 1950 had enlarged the directors' powers, and accordingly had provided shareholders with the restraining right against directors' illegal acts, the right to file representative action, or the right of removal of a delinquent director by the court for the purpose of strengthening shareholders' status against the directors.

For a shareholder to exercise these rights effectively, he needs to be well informed of the state of accounting in his corporation. This is why the inspection right was introduced as a right for shareholder to collect necessary information for exercising effectively those remedial rights on the model of the inspection right under U.S. case law. In contrast to U.S. case law, however, the inspection right under the Japanese Commercial Code can be used only by a shareholder with 10% or more of the issued shares in a corporation, and could not be linked with shareholders' remedial rights such as the rights to restrain or to file representative action which may be used by every shareholder with one share (held continuously for six months), the shareholders' proposal right available to a shareholder with either 1% or more of the issued shares or 300 shares, the right to convene the general meeting or the right of removal of a delinquent director by the court available to a shareholder with 3% or more of the issued shares held continuously for six months. As a result, it has been pointed out that the inspection right could not work effectively as an information-collecting right.

Thus, the Amendment Act has reformed the inspection right in stock corporations and has lightened the requirement to exercise the right from 10% or more of the issued shares to 3% or more thereof. Incidentally, it was argued that this right might be abused because of such relaxation, and then it was under consideration whether the additional requirement of holding those shares continuously for six months (six month-share-holding requirement) should also be adopted. Because most medium-sized and small-sized corporations, however, have restricted the transfer of shares in them by their articles of association, it is thought that there are few persons who purchase shares in those corporations mainly for the purpose of using the inspection right. In general again a corporation can refuse the application for inspection without any just ground by showing the statutory refusal cause against abuse of inspection right, and so the six-month-share-holding requirement was not adopted after all.

(3) Reform of the Corporate Auditing System.

After the Second World War, the Japanese Commercial Code has enriched and strengthened the auditing system of stock corpo-

rations by revesting the power to audit corporate affairs in the auditors of the stock corporations with capital of more than 100 million yen and also for the first time vesting them with the inquiry right concerning subsidiary corporations (amendment in 1974), by requiring large-sized corporations under the Audit Special Act to appoint a plural number of auditors and to make one of them the full-time auditor (amendment in 1981), etc. In Japan, however, corporate insiders have often been appointed as auditors of the corporation concerned, and the management under supervision by auditors has really been able to nominate the candidates for auditors. As a result, it has been doubted whether the independence of auditors is sufficiently secured, and it seems that they have not always filled the role of supervising the management. The ineffective function of the stock corporations' auditor system can be said to be illustrated by the scandals in larger stock corporations exposed especially since 1990. This called for the reform of the auditing system of stock corporations by making needed improvements in these points. Since the auditor's powers themselves, however, have been considerably extended by past amendments of the Commercial Code, the reform of the auditing system of stock corporations by this Amendment Act has aimed principally at not expanding auditor's powers but improving the auditing environments so as to enable him to exercise existing powers effectively.

From this point of view, the Amendment Act has first expanded the auditor's term of office from two years to three in every stock corporation. As this reform enables the auditor to devote himself to performing his duties without fear of his position once appointed, the effectiveness of auditing can be secured and it is expected that this reform can make the auditor's status steady by keeping his superiority over the directors in the term of office.

Secondly, the Amendment Act has increased the statutory minimum number of auditors from two to three in large-sized corporations under the Audit Special Act, and required the appointment of an "outside auditor" by providing that at least one of the auditors shall be a person who has not been either a director or manager or other employee of the corporation concerned or its subsidiaries for

five years before his appointment as an auditor. This reform may secure the outside auditor's independence of the directors institutionally, with the result that the objectivity of auditing can be expected to be better secured. Also the outside auditor is expected to play a certain role in maintaining discipline on corporate management, since the outside auditor would audit from the different viewpoint from other auditors who may have been insiders until just before their appointment.

Thirdly, the Amendment Act has required large-sized corporations under the Audit Special Act to set up a board of auditors consisting only of auditors, for the purpose of making the auditing system in these corporations both more efficient and more effective. The reasons are as follows. Even if a corporation appoints a plural number of auditors, the Japanese Commercial Code treats each of them as a separate organ of the corporation in a sense that they shall perform duties independently of each other. It is, however, impossible, especially in larger corporations, in fact for each auditor to audit the whole affairs of the corporation independently, and also it is extremely inefficient for him to perform the duties without mutual contact. For these reasons, the auditors in such large corporations have divided the duties among them, and each has relied on the work of the others in order to audit the entire affairs. In such a case the board of auditors has been set up frequently for the purposes of duty-division and co-operation among auditors, but this was simply a voluntary organ in legal terms.

Thus the Amendment Act has treated this board of auditors as a legal organ in large-sized corporations under the Audit Special Act and required such a corporation to set up a board of auditors. Since the outside auditor, who does not always know about what has been going on insdie the corporation, can obtain necessary information through the board of auditors, the mandatory setting up thereof is of certain substantial significance in making the outside auditor system effective, and is expected to strengthen the influential voice of auditors against directors.

Incidentally, as the majority rule applies also to the board of auditors, the concentration of all powers on this board is likely to result

in burying in the majority's opinion the minority's ones which are reasonable. In order to avoid such a situation, the Amendment Act has entrusted the board of auditors only with such matters as are suitable for majority decision or are largely procedural, while continuing to keep the nature of a separate organ in the powers to be exercised by each auditor independently; for example the former includes the powers to recieve report of auditors, to frame an audit program, to consent to the directors introducing the question of an appointment of the accounting auditor to the general meeting, etc., while the latter includes powers to supervise the directors' performance of their duies, to request a report about corporate business from the directors or employees, to inspect the state of affairs of the corporation concerned and its subsidiaries, to restrain directors' illegal acts etc., to express opinions at the general meeting about the appointment and removal of auditors, and so on.

To summarize, the provisions of the Commercial Code relating to the board of directors apply to the board of auditors with necessary modifications.

(4) Improvement in the Corporate Bond System.

The improvement in the corporate bond system on this occasion has two purposes: the first is to relax the regulations of bond issuance from the viewpoint of making corporate finance more mobile, and the second is to better or newly establish such arrangements as aim at the protection of bondholders.

For the first purpose the Amendment Act has abolished the statutory limits within which a corporation may issue its bonds, taking into account the strong requests from the business world for an abolition of such limits. The Commercial Code prior to this amendment provided that if a corporation were to issue bonds, the total amount of bonds shall not exceed either the total sum of the stated capital plus legal reserves or the net value of existing properties of the corporation as shown in its balance sheet. These limits have been said to aim at the bondholders' protection. Because such limits are unique as a scheme for protecting the bondholders from the viewpoint of comparative law, and there are no statutory upper limits on the amount of money that can be borrowed, which is equivalent to cor-

porate bonds in terms corporate debt, the abolition of such limits was requested from within both business and academic worlds. The Amendment Act of 1990 made some reforms on this point, which resulted in a relaxation of those limits only. Thus, the Amendment Act on this occasion has removed the greatest restriction on the issuance of bonds by abolishing such limits. In addition, the Amendment Act has made the issuance of bonds more mobile by adopting the joint bond system that two or more corporations may issue joint bonds, and by providing that even if the sum of the bonds really subscribed does not amount to that of the bonds offered, the corporation concerned may issue the bonds really subscribed only and cease to issue the unsubscribed bonds.

As to the second purpose, first of all, since the easier it is to issue bonds, the more necessary the bondholders' protection is, the Amendment Act has introduced into the bondholders meeting both the divided exercise of voting rights and the voting in writing which have already been adopted in the general meeting, in order to make it easier to hold the bondholders meeting validly and to secure every bondholder with a chance of voting, and also has made the function of the bondholders meeting more effective by enriching its minutes and changing the requirements for making resolutions therein. But these measures are not sufficient to protect the bondholders, particularly to keep their claims against the issuing corporation intact and secure payment. This is still more true, because the limits to the issuance of bonds above mentioned have been abolished by the amendment of this time. To be sure, this problem may be dealt with by securing corporate bonds, i.e., a rule concerning the issuance of secured bonds, but this rule would be likely to discourage financing with corporate bonds because of the limit to the security available to the issuing corporation, and can not always ensure the payment of bonds' principal and interest, taking into account the possibility that the security may decrease in value. Since the issuance of unsecured bonds has recently been considered in the business world, the bondholders' protections other than such a rule were under consideration.

Secondly, for the purpose of ensuring the payment of bonds, the

Amendment Act has newly provided that the corporation issuing bonds shall appoint a corporation to administer issued bonds (hereinafter referred to as the "bond-administrating corporation") as a rule in the case of offering bonds, and that the issuing corporation shall entrust the bond-administrating corporation on behalf of the bondholders to recieve the principal and interest, to keep their claims intact, and to carry out any other administration of issued bonds. Additionally, on the resolution of the bondholders meeting, the bond-administrating corporation may forbear the payment of bonds, exempt the issuing corporation's liabilities for default, and make any other actions belonging to the procedures or the bankruptcy or arrangement procedures relating to the bonds concerned. If necessary for taking these measures, the bond-administrating corporation may also inspect the state of the issuing corporation's affairs and properties with the leave of the court. Exceptionally, however, it is not necessary to appoint the bond-administrating corporation, if the amount of each bond is 500 million yen or more, or if the total number of issued bonds is less than 50. The former exception is that of issuing bonds to the qualified institutional investors under the Security Exchange Act, i.e., the large professional investors who do not need the statutory protection. The latter is an exception which is permitted because of the issuance of only a small number of bonds.

Incidentally, the bond-administrating corporation, which might be the main bank of the issuing corporation for example, may have claims against the issuing corporation, in which case a conflict of interests between the bond-administrating corporation and the bondholders arises. Thus, for the purpose of dealing with this conflict-of-interests problem, the Amendment Act has newly provided that the bond-administrating corporation shall have both the duty of care and the duties of fairness and loyalty toward the bondholders in general, and also has provided for the appointment of a special agent administrator in the case of conflicting interests. In addition, from the viewpoint of bondholders' protection, the Amendment Act has provided for the strict liability of a bond-administrating corporation, and then provided both the issuing corporation and the bondholders meeting with the right to remove a bond-administrating corporation

which is delinquent.

Prof. YASUHIRO OSAKI
NOBUO NAKAMURA

3. Labor Law

An Act to Amend the Labor Standard Law and the Temporary Act for Promotion of a Reduction in Working Hours.
Promulgated on June 2, 1993. Ch.79. Effective as of April 1, 1994.

[Outline of the Act]

Amendments to the Labor Standards Law are as follows.

1. Maximum Working Hours

In 1987, the 40-hour working-week system was declared for the first time by the Labor Standards Law. But a distinctive feature of this 40-hour system is that for the time being the 40-hour-per-week standard is not set forth as maximum working hours enforced by criminal sanctions. Rather, it is established as a goal for reducing maximum working hours. Therefore, the original Article 131 of the ordinances supplementing the Law provided that for the time being "'40-hours" may mean "hours in excess of 40 and less than 48 as established by a Cabinet Order" and that hours established by a Cabinet Order will "take into consideration the welfare of the workers, the trend in working hours, and other circumstances" and "be set and revised so as to reduce them in stages." In a Cabinet Order, the weekly maximum working hours were established as 46 in the first stage.

Now Article 131 of the ordiances supplementing the Labor Standards Law is amended in two points.

First, the transitonal measures, which were hitherto applied to all enterprises, are restricted to enterprises as follows: (1) mining enterprises, transportation and communication enterprises, and cleaning